

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 61758-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ISAURO HERNANDEZ-ZARATE, a/k/a	)	Unpublished Opinion
SANTIAGO HERNANDEZ-LOZANO,	)	
	)	FILED: June 1, 2009
Appellant,	)	
	)	

Lau, J. — Isauro Hernandez-Zarate pleaded guilty to second degree murder. His sentence included a period of community custody conditioned on his undergoing alcohol and substance abuse evaluation and any recommended treatment. On appeal, he challenges this community custody condition to the extent it includes substance abuse evaluation and treatment, as opposed to merely alcohol abuse evaluation and treatment. Because there was no evidence that substances other than alcohol contributed to the offense, we agree that the substance abuse evaluation and treatment condition was improper and remand for resentencing.

### FACTS

The State charged Isauro Hernandez-Zarate with one count of second degree murder. According to the certification for determination of probable cause, he drank beer before the murder. Hernandez-Zarate pleaded guilty and stipulated to the material facts set forth in the certification of probable cause. The crime occurred on September 15, 2007. The sentencing court imposed a standard range 172-month sentence and 24 to 48 months of community custody. As a special condition of community custody, the court ordered Hernandez-Zarate to “participate in the following crime-related treatment or counseling services: alcohol and substance abuse evaluation and follow treatment recommendations.”

### ANALYSIS

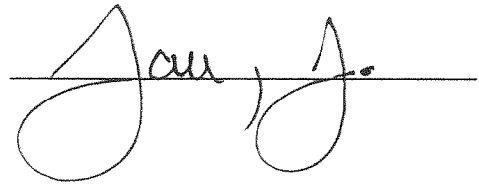
Hernandez-Zarate contends that the sentencing court exceeded its statutory authority in ordering him to undergo “alcohol and substance abuse evaluation” and any recommended treatment. While conceding that the alcohol evaluation and treatment component of the condition was proper, he argues that the substance abuse evaluation and treatment component was improper because there was no evidence that substances other than alcohol contributed to his offense. “We review a sentencing court’s application of the community custody provisions of the Sentencing Reform Act of 1981 . . . de novo.” State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007). And we review the underlying findings of fact for substantial evidence. Motter, 139 Wn. App. at 301.

RCW 9.94A.700(5)(c) allows the sentencing court to order an offender to "participate in crime-related treatment or counseling services" as a condition of community custody. In addition, RCW 9.94A.715(2)(a) allows the sentencing court to order the offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community . . . ." But when a court orders an evaluation and treatment under these provisions, the evaluation and treatment must address an issue that contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003). In Jones, Division Two of this court held that a sentencing court erred in ordering alcohol counseling when the evidence showed that only methamphetamines were involved in the crime, not alcohol. Jones, 118 Wn. App. at 202, 207–08.

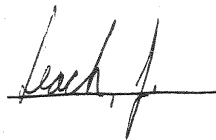
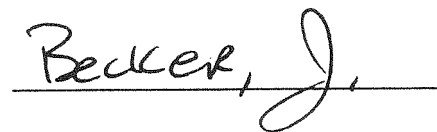
Here, there was no evidence that substances other than alcohol contributed to the offense. The State argues that alcohol is a "substance" that can be abused, so there should be no distinction made between alcohol abuse and substance abuse. But the sentencing court apparently recognized a distinction because it ordered Hernandez-Zarate to undergo "alcohol and substance abuse evaluation." (Emphasis added.). Moreover, the Jones court recognized a difference between controlled substances and alcohol by holding that alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense. Jones, 118 Wn. App. at 202, 207–08. We adhere to this conclusion. Under the Sentencing Reform Act's sentencing scheme, a substance abuse evaluation and treatment condition can be

imposed only when controlled substances, as opposed to alcohol alone, contribute to the defendant's crime. Because there is no evidence that substances other than alcohol contributed to the crime here, the condition that Hernandez-Zarate undergo substance abuse evaluation and any recommended treatment was improper.

We remand for resentencing, with instructions to strike the substance abuse condition.

A handwritten signature in cursive script, appearing to read "Juan J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Leach, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Becker, J.", written over a horizontal line.